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No. 91-1326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE DISTRICT OF COLUMBIA AND
SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF AMERICAN OPTOMETRIC ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF AMERICAN OPTOMETRIC ASSOCIATION IN SUPPORT OF PETITIONERS

The American Optometric Association submits this brief amicus curiae in support of petitioners. Letters granting consent, received from counsel for each of the parties, have been filed with the Clerk of this Court.

INTEREST OF AMERICAN OPTOMETRIC ASSOCIATION

The American Optometric Association ("AOA"), a nonprofit membership organization incorporated un-

der Ohio law, is a national professional association of more than 29,000 members consisting of licensed Doctors of Optometry, optometry students,and educators. AOA's objects, as set forth in its Constitution, "are to improve the vision care and health of the public and to promote the art and science of the profession of optometry." AOA has as affiliates the State optometric associations in each of the 50 States and in the District of Columbia, the Armed Forces Optometric Society and the American Optometric Student Association.

As the national professional organization representing the optometric profession, AOA has always been, and is now, vitally interested in matters affecting the adequacy of vision care available to the public. This includes, among other things, AOA's interest in supporting and sustaining what is usually called "freedom of choice" legislation. "Freedom of choice" is the universally enacted State legislation which, so far as it applies to the field of vision care, prevents insurance companies, health benefit plans and others from discriminating against the practice of optometry; it likewise prevents discrimination against patients who in obtaining vision care wish to utilize the professional services of optometrists instead of physicians for those services within the lawful scope of the practice of optometry.

The present case is one of a series that—depending on what this Court says about the scope of the ERISA preemption—may have a substantial impact on such matters on a national basis. When the Massachusetts ERISA litigation was before this Court, AOA filed a brief amicus curiae in support of the Commonwealth of Massachusetts, urging affirmance. The Massachu-

setts court had held that the "mandated benefit" provision (requiring reimbursement to be made for certain mental illness costs), which the Massachusetts statute made applicable to employee health benefit plans placed with insurance carriers, was not preempted by ERISA because such application of the mandated benefit statute was saved by the insurance savings clause in ERISA's preemption provision. This Court affirmed the judgment. *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985). AOA also urged that, no matter what decision this Court might reach as to whether the Massachusetts mandated benefit statute was preempted, the Court should in any event avoid any intimation which might impair or cast a cloud on the continuing validity of the widely-adopted, but very different, State freedom of choice legislation. We submit that the Court's opinion in *Metropolitan Life* was responsive to this concern, and that the Court's opinions in subsequent ERISA preemption cases have manifested a similar caution.

The substance of AOA's position is this: While the broad preemption language in ERISA is to be interpreted generously, the preemption should not be given an overzealous overbreadth which would smother legitimate State legislation that Congress never would have intended to displace. The present case involves a 1991 amendment, D.C. Code (1991 Cum.Supp.) §36-307(a-1), to the District of Columbia workers compensation legislation, which permits an employer to comply with the workers compensation law by establishing an employee benefit plan separate from the employer's ERISA-covered benefit plans provided that the separate plan establishes benefits equivalent to those established by the workers compensation law.

In holding that this statute is preempted, the District of Columbia Circuit has stretched the ERISA preemption beyond reasonable bounds. While AOA's interest in the narrower aspects of the issue as to this particular District of Columbia Code provision may seem in some respects peripheral, AOA's interest in this Court's disposition of the case is strong.

SUMMARY OF ARGUMENT

Petitioners' position that the District of Columbia statute here involved is exempt from ERISA—and hence exempt from preemption by ERISA—finds abundant support in the language of the ERISA exemption relating to workmen's compensation laws. It is likewise supported by the Congressional policy underlying the exemption and by the well-reasoned opinion of the Second Circuit which the District of Columbia Circuit chose here to reject. The exemption—which was intended to preserve for the States an area traditionally regulated by the States—should not be given the grudging interpretation which the District of Columbia Circuit has arrived at. Accordingly the judgment should be reversed.

But in any event—whatever the result that may be reached by the Court on that question—the Court should carefully avoid any decision route which would impair or cast a cloud upon any of the State freedom of choice legislation. In the field of vision care for example, when a benefit plan covers certain services relating to eye conditions, the freedom of choice legislation prevents the plan from refusing to reimburse the employee who chooses to go to an optometrist instead of to an ophthalmologist. For a variety of reasons it is important that no preemption of such

legislation be read into the ERISA preemption clause. The Court should leave that matter fully open for consideration at some future date when the question does come before it directly.

ARGUMENT

I. Introductory

For more than a decade this Court and the lower courts have been wrestling with questions arising out of ERISA's rather complex, and by no means crystal-clear, preemption provision. Presumably Congressional clarification, if it could be obtained, would be welcome. But it has not been forthcoming, and meanwhile this Court and the lower courts have been proceeding on a case-by-case basis.

AOA's primary interest in this and comparable litigation is to help assure that, when the issue finally comes squarely before this Court (if it ever does), all of the State freedom of choice laws are sustained against any claim of ERISA preemption.[1] As ERISA

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[1] When *Blue Cross Hospital Service, Inc.* v. *Frappier* was remanded by this Court, 472 U.S. 1014 (1985), for further consideration in light of *Metropolitan Life*, supra, the Missouri Supreme Court disposed of the case by holding that, in the light of *Metropolitan Life*, it is clear that State freedom of choice statutes applicable to insured plans (such as the Missouri statute) come within ERISA's insurance savings clause and hence are not preempted by ERISA. *Blue Cross Hospital Service, Inc.* v. *Frappier*, 698 S.W. 2d 326 (Mo. 1985). Accord, *Blue Cross and Blue Shield of Kansas City* v. *Bell*, 798 F.2d 1331 (10th Cir. 1986), holding that the Kansas freedom of choice statute applicable to insured plans comes within ERISA's insurance savings clause and hence has not been preempted.

One subsequent appellate decision has held that ERISA

preemption law develops in the meantime, no needless impediment should be placed in the way of this sound ultimate result.

At the outset it should be noted that the freedom of choice laws are totally unlike the mandated-benefit law which was before this Court in *Metropolitan Life*. The State freedom of choice laws do not require that a health plan shall cover any particular illness or condition. They do not force upon a plan the coverage for this or that illness or condition. For example, the freedom of choice laws do not require that a plan cover vision care at all; and if the persons responsible for formulating the plan do wish to cover particular aspects of vision care, the freedom of choice laws do not dictate which types of eye diseases or eye conditions or eye examinations shall be covered or with what frequency such coverage may be availed of by the employee.

Instead, the freedom of choice laws consist of a vast body of State enactments, on the books in one or more forms in all 50 of the States and in the District of Columbia, which safeguard a patient's freedom of choice to select a provider of a particular health care service when the plan does cover the service. With respect to vision care coverage—if and to the extent that such coverage is actually provided for by an employee benefit plan—this means that there was and is pervasive State legislation requiring that the plan not refuse to reimburse the patient who pre-

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preempts an Alabama freedom of choice statute when reimbursement is sought under a self-insured employee benefit plan for services furnished by a chiropractor. *Mullenix* v. *Aetna Life & Cas. Ins. Co.*, 912 F.2d 1406 (11th Cir. 1990)—a case we submit was incorrectly decided.

fers to use the professional services of an optometrist (instead of a physician), as long as the services come within what may lawfully be performed by a licensed optometrist under the laws of the particular State. Moreover, the freedom of choice laws do not inflict on the benefit plans any additional costs in the vision care field; and indeed, practical experience has indicated that, on the whole, the costs of services performed by optometrists tend to be less than the costs of comparable services performed by ophthalmologists.

Throughout the Nation these freedom of choice statutory provisions have been enacted to assure to the patient his or her right of choice and, so far as vision care is concerned, to prevent discrimination against using the professional services of optometrists. The freedom of choice statutes represent deep-rooted policies of the States concerned, in a field normally governed by State law. Moreover, since optometrists usually are more widely dispersed geographically, and more conveniently located, within a State than are ophthalmologists, such legislation helps to assure that patients, particularly the elderly, will have greater access to convenient prepaid health care.[2]

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[2] In 1980, Congress expanded Medicare coverage to include services performed by optometrists in connection with the condition of aphakia. See 42 U.S.C. §1395x(r)(4), discussed in note 5 infra. In a 1976 Report recommending the adoption of this amendment, the Department of Health, Education and Welfare stated: "6. *Access to services.* Vision/eye care services for aphakic and cataract patients, as well as for patients more generally, can be made more accessible to the Medicare eligible population by providing reimbursement for services when provided by optometrists. In general, optometrists are more widely distributed

Accordingly, it is AOA's position that:

(1) State freedom of choice laws are outside the scope of ERISA's preemption clause fairly interpreted. This turns on a fair but not over-extravagant reading of the preempting phrase "all State laws insofar as they may now or hereafter relate to any employee benefit plan," in 29 U.S.C. §1144(a); and

(2) in any event, proper recognition should be given not only to the scope of ERISA's insurance savings clause, 29 U.S.C. §1144(b), as in *Metropolitan Life*, supra, but also to the scope of the express exemptions from ERISA, such as the exemption particularly involved in this case, where 29 U.S.C. §1003(b)(3) expressly exempts an employee benefit plan "maintained solely for the purpose of complying with applicable workmen's compensation laws."

We deal with the latter point first.

II. This District of Columbia Statute Comes Within ERISA's Workmen's Compensation Exemption Fairly Interpreted.

This question, on which the outcome of the case will likely turn, was extensively developed by

geographically and practice in many smaller communities where other vision/eye care practitioners are not available." U.S. Department of Health, Education and Welfare, *Report to Congress: Reimbursement Under Part B of Medicare For Certain Services Provided by Optometrists*, as required by Title I, Section 109, of P.L. 94-182 (July 1976), p. v. Similarly, in connection with a 1986 Medicare amendment eliminating discrimination against optometry (also discussed in note 5 infra) the House Committee Report stated: "Many beneficiaries are either foregoing covered eye care or are paying out-of-pocket for eye care services furnished by optometrists, because they do not have ready access to an ophthalmologist and because the present rules are too difficult to understand." H.Rept. 99-727, 99th Cong., 2d Sess., p. 81 (October 17, 1986).

petitioners in their petition for certiorari and in their reply to respondent's brief in opposition. Petitioners showed the strong support which their position derives from this Court's decision in *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983). They also had the support of the Second Circuit's well-reasoned decision in the comparable Connecticut case, *R. R. Donnelley & Sons Co.* v. *Prevost*, 915 F.2d 787 (1990), cert. denied 111 S.Ct. 1415 (1991)—a decision which the District of Columbia Circuit unfortunately rejected here. It is expected that petitioners will develop further in their brief on the merits their argument in support of the exemption, drawing on the statutory language and the manifest legislative purpose.

Without necessarily subscribing to every component of the petitioners' argument, we strongly support its main thrust and its conclusion. Express exemptions from Congressional legislation should be interpreted fairly, not grudgingly. The context is one where the purpose of the exemption clearly "forbids a narrow, cramped reading." *United States* v. *Alaska*, No. 118 Orig., decided April 21, 1992, 60 USLW 4315, 4318, quoting *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491(1960). This is particularly true in the ERISA domain, where certain areas previously subject to intensive State regulation and control have been taken over by federal mandate. The Court said as much in one of its early ERISA opinions, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981):

> As we recently reiterated, "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated

> subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" [numerous citations omitted]

The Court has subsequently reiterated this well-settled principle on various occasions. E.g., *California* v. *ARC America Corp.*, 490 U.S. 93, 101 (1989); *Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). And, as the Court reminded us only the other day, "It is not lightly to be assumed that Congress intended to depart from a long established policy." *United States* v. *Wilson*, 503 U.S. ___ , 112 S.Ct. 1351, 1355 (1992), quoting *Robertson* v. *Railroad Labor Board*, 268 U.S. 619, 627 (1925). These are the principles which should carry the day in favor of sustaining the exemption here.

III. In Any Event, The Court Should Be Cautious Against Giving Undue Breadth To The ERISA Preemption Phrase "Relate To."

Metropolitan Life, supra, and its progeny have given broad scope to the ERISA preemption phrase—which preempts, with certain exceptions and subject to certain exemptions, "all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. §1144(a). See, e.g., *FMC Corp.* v. *Holliday*, 498 U.S. ___ , 111 S.Ct. 403, 407-408 (1990); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. ___ , 111 S.Ct. 478, 484 (1990). But the Court has also made clear that "Notwithstanding its breadth, we have recognized limits to ERISA's pre-emption clause." *Ingersoll-Rand*, 111 S.Ct. at 483. Illustrative of these limits are the decisions in *Mackey* v. *Lanier Collection Agency & Serv.*, 486 U.S. 825 (1988), and *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987); see also *Shaw*, supra, 463 U.S. at 100 note 21 (1983).

Nothing in the Court's decisions to date has addressed the question whether the freedom of choice laws, with which AOA is especially concerned, do or do not come within the ERISA preemption clause. AOA urges that, no matter how this particular case involving a District of Columbia Code provision is decided, care be taken to avoid any intimation which might impair or cast a cloud on the validity of any of the widely-enacted State freedom of choice laws.

As has been noted, freedom of choice laws raise the question of what is the fair and reasonable interpretation of the word"relate" in ERISA's preemption clause. In our highly interdependent world, it can be argued that almost anything "relates" to almost anything else, and yet it must be clear that, as this Court has recognized, Congress could not have intended that the doctrine of preemption be carried to the utmost or even too far.

For example, it might be argued that a State law imposing general minimum safety standards for x-ray equipment, which would include equipment used in a clinic dedicated to examining and treating employees under a plan, is a law which "relates" to an employee benefit plan; yet it is hard to believe that anyone would take seriously a claim that ERISA preempts such a State law. For another example, a State law which imposes minimum fire safety standards on a facility made available to employees under a benefit plan could, arguably, be said to be a law which "relates" to the plan; but, again, the contention that ERISA preempts such a law would defy common sense.

In other words, it continues to be necessary, on a case-by-case basis, to find the appropriate place for

the ERISA preemption line to be drawn. In important decisions subsequent to *Metropolitan Life*, supra, this Court has made it clear that the question of where the line is to be drawn should turn not merely on the cumbersome statutory language but also on a fair consideration of the historical context, and of whether the Congressional purposes manifested in ERISA would be aided or subverted. Thus *Fort Halifax*, supra, held that a Maine statute mandating a one-time severance payment in the event of a plant closing did not "relate to any employee benefit plan." *Mackey*, supra, decided that ERISA does not preempt Georgia's general garnishment law and hence does not prevent creditors of ERISA welfare benefit plan participants from bringing garnishment proceedings against the plan in order to collect judgments against plan participants. In reaching this conclusion this Court said (486 U.S. at 834):

> state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA; otherwise, there would be no way to enforce such a judgment won against an ERISA plan. If attachment of ERISA plan funds does not 'relate to' an ERISA plan in any of these circumstances, we do not see how respondent's proposed garnishment order would do so.

The Court carefully distinguished this general garnishment law from a special exemption the Georgia legislature had enacted which applied solely to ERISA employee benefit plans and which exempted them from garnishment; that exemption statute the Court held was preempted since it was specifically designed to affect employee benefit plans (486 U.S. at 829-830). Indeed, it should be clear that even if the Court were to find it appropriate to conclude in the present case that the District of Columbia Code provision should be deemed to "relate" to employee benefit plans, such a conclusion would in no way pre-determine whether the State freedom of choice legislation so "relates."

A considerable segment of the State freedom of choice legislation relating to vision care—some of it pertaining to insured plans only, some of it pertaining to plans not incorporated into insurance policies, and some of it pertaining to both—was enacted during the 1960s, long before ERISA was passed in 1974.[3] Hence the total absence, in ERISA's legislative history, of any suggestion that Congress intended to preempt this mass of freedom of choice legislation, which was already well-known at that time, adds much weight to the other reasons for concluding that no such preemption has occurred. Compare *Dewsnup* v. *Timm*, 502 U.S. ___, 112 S.Ct. 773, 779 (1992).

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[3] Such freedom of choice legislation relating to vision care dating from the 1960s is to be found in at least 24 States—namely, Alabama, Arizona, California, Colorado, Hawaii, Idaho, Indiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Washington, West Virginia—and from 1970 through 1973 in at least 10 additional States—namely, Arkansas, Florida, Kansas, Kentucky, Louisiana, Missouri, Nevada, New Mexico, New York, Virginia. (This is apart from the considerable body of freedom of choice legislation dating from those periods and relating to branches of health care other than vision care.) Accordingly, much of the freedom of choice legislation not only antedates the enactment of ERISA in 1974 (P.L. 93-406, September 2, 1974), but will be found well before 1970.

With respect to vision care, the freedom of choice laws are aimed at protecting people by assuring that more widespread vision care is available, by safeguarding the patient's freedom of choice, and indeed by discouraging monopolistic or restrictive practices—whether indulged in by insurance companies or by employers or by unions or by others. Such monopolistic practices would tend to channel away from optometrists, and in to physicians, the professional responsibility for and the revenue from the performance of vision care services which otherwise would flow to optometrists. Compare *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982).[4]

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[4] In the event that the question of ERISA preemption of State freedom of choice laws were to be directly litigated, there are at least two additional independent grounds supporting AOA's position that no such preemption exists.

First, preemption of the State freedom of choice laws would impair the federal antitrust laws and hence, we would urge, is expressly forbidden by ERISA itself in 29 U.S.C. §1144(d), which provides that nothing in ERISA "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States" (with certain specified exceptions not relevant here). Various employee benefit plans, both insured and self-insured, contain discriminatory and restrictive provisions having highly anticompetitive effects injurious to the public interest, which create lively and realistic opportunities for group boycotts and other seriously discriminatory practices. Such provisions offend not only the public policy and statutes of many States, but also the federal antitrust laws. *Blue Shield of Virginia* v. *McCready*, supra; accord, *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), cert. denied 450 U.S. 916 (1981); *Wilk* v. *American Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990), cert. denied 111 S.Ct. 513 (1990); compare *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 457-465 (1986). The freedom of choice laws stand as

This Court emphasized in *Fort Halifax*, supra, 482 U.S. at 11, that the Congressional purpose in adopting the preemption provision was to assist in achieving uniformity in the administration of an employee benefit plan having multi-state scope. In view of the fact that, with at most some minor variations, State freedom of choice legislation is universally present in the 50 States and the District of Columbia, no significant administrative diversity or complexity will be imposed by acknowledging that ERISA has not preempted any of the State freedom of choice statutes.[5]

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a bulwark against those who would otherwise commit serious violations of the federal antitrust laws. If ERISA were to be interpreted as preempting the State freedom of choice laws, it could hardly be doubted that there would be a serious impairment of the federal antitrust laws and of the policies which the federal antitrust laws espouse. Harmonious reading of ERISA as a whole should surely lead to the non-preemption result. Compare *Shaw*, supra, 463 U.S. at 102, holding that State fair employment laws are so important to the federal Title VII statute (of the Civil Rights Act of 1964) that such State laws are not preempted by ERISA.

For the second independent ground, see note 5, infra.

[5] With respect to the additional independent grounds supporting non-preemption (see note 4, supra), the second such ground is that preemption of the State freedom of choice laws would also impair the 1986 federal Medicare amendment relating to optometry, and hence for this additional reason is expressly forbidden by the same ERISA provision in 29 U.S.C. §1144(d) referred to in note 4, supra. Until the 1986 amendment, most services rendered by optometrists were not reimburseable under Medicare, even though applicable State law authorized optometrists to perform the services and such services when rendered by an ophthalmologist were reimburseable. However, the 1986 legislation amended Clause (4) of 42 U.S.C. §1395x(r), to put the services furnished by optometrists on a totally equal

AOA's position—which AOA urges should be fully protected against dilution or impairment—was further confirmed within Congress during the enactment of the ERISA amendments known as the Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, codified as 29 U.S.C. §§1001a et seq. During the final stages of that bill's passage in the House, Congressman Thompson (who was Chairman of the House Subcommittee on Labor-Management Relations and was piloting the bill through the House debates and was later one of the House Managers in the Conference Committee) stated (126 Cong.Rec. 23042, August 25, 1980):

> "Finally, the distinguished gentleman from Texas, Representative Frost, has asked me to clarify the effect of ERISA's preemption provision on a state law requiring that health insurance contracts written in that state must provide covered persons the option to choose the specialist of their choice or must provide that the services of a particular specialist

footing, for Medicare reimbursement purposes, with those furnished by ophthalmologists, to the extent that the services fall within the lawful scope of the practice of optometry. Thus the amendment firmly established a federal statutory policy of nondiscrimination, patient freedom of choice, and equal treatment in the field of vision care. This federal statutory policy had been foreshadowed, with respect to the policy of nondiscrimination and freedom of choice, by two items of earlier legislation relating to federal employees (P.L. 93-363, adding what is now 5 U.S.C. §8902(k)); and P.L. 93-916, amending 5 U.S.C. §8101(2) and (3)), which were enacted in 1974 by the same Congress which enacted ERISA. The federal statutory policy is fully consistent with,and is based on comparable policy considerations as, the State freedom of choice laws.

> must be covered by the insurance contract if that patient chooses to go to that specialist. It is clear that ERISA does not preempt such a law, which does not require that particular benefits be provided and therefore does not cause any cost-creating State law conflicts that preemption was intended to prevent. For example, a State law requiring that podiatrist, chiropractor, or optometrist services be covered by health insurance contracts if a person chooses to have a particular service performed by a podiatrist, chiropractor, or an optometrist, is not preempted."

We recognize that the views of a later Congress on such matters are not necessarily controlling. See *Mackey*, supra, 486 U.S. at 839-840; *United States* v. *Monsanto*, 491 U.S. 600, 610 (1989). But the foregoing statement from the pertinent Congressional leadership furnishes strong confirmatory support to AOA's position on this precise issue. Compare *Gozlon-Peretz* v. *United States*, 498 U.S. ___ , 111 S.Ct. 840, 847 (1991).

CONCLUSION

For the reasons we have summarized, the judgment should be reversed. In any event—and no matter how this Court decides to deal with the issues raised—the Court is urged to avoid any decision route which would impair or cast a cloud upon any of the State freedom of choice legislation which is so important to the Nation's welfare.

Respectfully submitted,

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